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Kuala Dimensi Sdn Bhd v Port Kelang Authority

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-7–04 OF 2024(B)
ZABARIAH YUSOF, HASNAH HASHIM AND ABDUL KARIM FCJJ
3 JANUARY 2025

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Contract — Consideration — Lack of consideration — Dispute over validity of contract — Parties entered into new contract to increase chargeable interest payable under original contract — Plaintiff alleged new contract null and void for want of consideration — Defendant alleged new contract executed with consideration and therefore valid — Whether consideration ought to be proved only within four corners of new contract — Whether consideration could be proved by extrinsic evidence — Whether practical benefit test in Williams v Roffey Bros and Nichollas (Contractors) Ltd [1991] 1 QB 1 was good law — Whether parties who had made their intention clear by entering into legal relations were bound by variation agreement to vary original contract when they had acted upon variation agreement — Whether parties who entered into agreement were bound by such agreement even if they received no consideration — Whether doctrine of estoppel should be invoked against plaintiff when it had agreed to the proposal to increase interest rate and paid without reservation — Contracts Act 1950 ss 26 & 63

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Evidence — Extrinsic evidence — Admissibility — Admissibility of extrinsic evidence to interpret contract — Whether consideration of contract could be proved by extrinsic evidence — Whether relevant circumstances under provisos in s 92 of Evidence Act 1950 established — Evidence Act 1950 ss 91 & 92

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Kuala Dimensi Sdn Bhd ('the defendant') was appointed by Port Kelang Authority ('the plaintiff') as the turnkey contractor to construct and develop the Port Klang Free Zone ('the PKFZ'). For this purpose, the parties entered into several contracts, inter alia, the development agreement dated 27 February 2003 ('DA1'), the supplemental agreement dated 26 May 2003 ('DA2'), the supplemental agreement to DA1 dated 27 March 2004 ('DA3'), the supplemental agreement for the additional development works dated 30 November 2005 ('ADW1'), the supplemental agreement for additional works dated 26 April 2006 ('ADW2'), and the supplemental agreement for new additional development works to DA1 dated 26 April 2006 ('NADW'). Chronologically, ADW2 was executed by the parties six months after the execution of ADW1 with the purpose of increasing the chargeable interest payable under ADW1 from 5%pa to 7.5%pa considering the purported increase in the base lending rate. Due to the execution of ADW2, the plaintiff

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had to pay an additional payment of RM49.367m ('the additional payment') to the defendant under ADW1. In order to raise the required financing for the works under ADW1 and NADW, the defendant had incorporated Valid Ventures Bhd ('VVB') in relation to ADW1, and Free Zone Capital Bhd ('FZCB') in respect of NADW. The relevant particulars regarding ADW1 were as followed: (a) the costs incurred by the defendant in carrying out the works under ADW1 was RM510.38m; (b) the defendant had financed ADW1 via the issuance of private debt securities by VVB for the sum of RM595.89m; and (c) the defendant would receive a total amount of RM677.123m from the plaintiff under ADW1. As for NADW, the relevant particulars were as followed: (i) the costs incurred by the defendant in carrying out the works under NADW was RM335.8m; (ii) the defendant had financed NADW via the issuance of private debt securities by FZCB for the sum of RM410m; and (iii) the defendant would receive a total amount of RM522.584m from the plaintiff under NADW. The disgruntlement in the present case was in relation to the validity of ADW2. In this regard, the plaintiff asserted that ADW2 was null and void for want of consideration whilst the defendant argued that ADW2 was executed with consideration and was therefore valid. On this point, the defendant's statement of defence disclosed that the defendant's consideration under ADW2 was its undertaking of the additional financial burden of financing the works under NADW, having already agreed to finance the works under ADW1 which would cause financial strain to the defendant. The issue in the present case revolved on whether the agreement, ADW2 entered between the plaintiff and the defendant was executed without consideration and therefore null and void under s 26 of the Contracts Act 1950 ('the CA'). The High Court found that ADW2 was executed with consideration and was therefore valid. The Court of Appeal disagreed with the High Court's decision and opined that the consideration was not explicitly mentioned in ADW2, as such, ADW2 was null and void for want of consideration. The questions of law to be determined by the Federal Court were as followed: (A) where it was alleged that there was no consideration for the agreement between the parties, was consideration to be proved only within the four corners of the said agreement or could the same be proved by extrinsic evidence ('question 1') — with respect to extrinsic evidence, the defendant relied on a letter dated 19 April 2006 from the plaintiff regarding the increment of chargeable interest rate under ADW1; (B) whether the practical benefit test, as laid down in *Williams v Roffey Bros & Nichollas (Contractors) Ltd* [1991] 1 QB 1 ('Williams v Roffey'), was good law ('question 2') — regarding this issue, the defendant argued that ADW2, which was a variation of ADW1, was supported by practical benefits such as cost savings and timely project completion due to the defendant's continued involvement; (C) whether parties who had made their intention clear by entering into legal relations, were bound by an agreement to vary their previous agreement when they had acted upon the former, namely the variation agreement ('question 3'); and (D) whether the doctrine of estoppel should be invoked against the respondent (the plaintiff)

when it had agreed to the proposal to increase the interest rate and made payment of the same without reservation ('question 4'). A

Held, dismissing the appeal and affirming the decision of the Court of Appeal with costs of RM100,000 to the respondent (the plaintiff) subject to allocatur: B

(1) Based on the evidence, it was clear that the costs of the works under ADW1 and NADW were fully covered by VVB and FZCB via the issuance of the private debt securities. Therefore, the defendant did not have to incur any financial obligation on its own to complete the works under ADW1 and NADW. The court found that the purported increase in the base lending rate (for which no evidence was led at trial) so as to require the execution of ADW2, and the performance of works under NADW, would not have caused any financial strain to the defendant. This was because, the defendant had raised excess financing to cover its costs for carrying out the works under ADW1 and NADW and was due to receive consideration in the form of profits, which were in excess of the financing. Further, the argument of the increase in chargeable interest in ADW2, factually, could not have alleviated any purported financial strain at the material time, ie, in 2006 considering that the additional payment was only made in July 2011 (see paras 33–34, 37–38, 44–45, 48 & 53–54). C D E

(2) Pursuant to s 91 of the Evidence Act 1950 ('the EA'), no evidence shall be given to prove the terms of the contract, except that it should be gathered from the four corners of the contract itself. If parties were allowed to adduce extrinsic evidence to contradict their intention or obligations other than as stated in the contract, it would be in violation of s 92 of the EA. In the present appeal, the defendant had not made out the relevant circumstances under any of the provisos in s 92 of the EA to enable extrinsic evidence to be admitted in the interpretation of ADW2 (see paras 69 & 72). F G

(3) In respect of question 1, the court found that: (a) the letter dated 19 April 2006 failed to state the nexus between ADW2 and NADW; (b) both NADW and ADW2 were distinct and separate agreements and no reference (impliedly or expressly) was ever made in ADW2 to NADW; (c) as the terms of ADW1, ADW2 and NADW were separate and distinct, and they were not executed simultaneously, hence they should be construed separately; and (d) the performance of existing contractual obligations under the original contract was not to be taken as sufficient consideration for any subsequent variation, which meant that, fresh consideration in addition to that already owing would need to be provided for the variation to be binding — in this regard, s 63 of the CA stated that if parties agreed to alter the said contract, the original contract needed not be performed. The court opined that question 1 was not H I

premised from the decision of the Court of Appeal. There was no extrinsic evidence relied upon by the Court of Appeal in arriving at its decision and neither was there any extrinsic evidence in existence to support the assertion that ADW2 was supported by consideration. The court therefore declined to answer question 1 (see paras 68–69, 84, 90, 92 & 95–96).

(4) In relation to question 2, the court found that: (a) the decision in *Williams v Roffey* was inconsistent with the long-standing rule that consideration, being the price of the promise sued upon, must move from the promisee; (b) there were no reported Malaysian cases that had accepted the application of the 'practical benefit' principle as set out by *Williams v Roffey*; (c) the facts in *Williams v Roffey* could be distinguished with the present appeal whereby in the present appeal, there was no evidence led by the defendant that it would have been unable to perform its obligations under ADW1 and/or enter into NADW if ADW2 was not executed; (d) there was no practical benefit to the plaintiff by the defendant, by entering into the ADW2, but only an additional monetary benefit to the defendant; and (e) it would not be appropriate to apply the principle in *Williams v Roffey* to the present appeal as it was never raised in the courts below. As the practical benefit test in *Williams v Roffey* was never raised, discussed or adjudicated in the courts below, the court declined to answer question 2 (see paras 103–108 & 116–117).

(5) Question 3 appeared to ignore the clear provision of s 26 of the CA that for this provision to even be applicable, there must first have been an agreement entered into between two parties. Without the existence of an agreement, s 26 of the CA needed not even be considered. Under s 26 of the CA, for an agreement to be valid, there must be consideration. Therefore, the proposition that, since the parties had intended and agreed to enter into legal relations and acted on the same (for the sole consideration of only one party), all agreements could not be deemed void, contradicted s 26 of the CA. The court therefore answered question 3 in the negative (see paras 126–129).

(6) The doctrine of estoppel could not prevail against a statute or protect against illegality. This doctrine could not be relied on to create an enforceable contract in the absence of consideration. In the present case, the court found that: (a) the defendant had failed to show how they had altered their contractually bound position and/or conduct due to ADW2; (b) the plaintiff had never acted on ADW2 prior to the commencement of the action herein, as the payment to be made under ADW2 was only made in July 2011, approximately two years after the action had commenced in the High Court; and (c) the additional payment could not amount to a waiver of the plaintiff's rights given that the plaintiff had already commenced its claim in the courts

approximately two years before the additional payment was made. Based on the above findings, the court opined that there could be no application of the doctrine of estoppel in the present case in order to defeat the plaintiff's claim for a declaration that ADW2 was void pursuant to s 26 of the CA. The void ADW2 could not be legitimised due to the conduct of parties and/or by the doctrine of estoppel. It was automatically void due to a lack of consideration. The court answered question 4 in the negative (see paras 133, 142, 145, 148–149 & 151–153).

[Bahasa Malaysia summary

Kuala Dimensi Sdn Bhd ('defendan') telah dilantik oleh Lembaga Pelabuhan Kelang ('plaintif') sebagai kontraktor turnkey untuk membina dan membangunkan Zon Bebas Pelabuhan Klang ('PKFZ'). Untuk tujuan ini, pihak-pihak telah menandatangani beberapa kontrak, antara lain, perjanjian pembangunan bertarikh 27 Februari 2003 ('DA1'), perjanjian tambahan bertarikh 26 Mei 2003 ('DA2'), perjanjian tambahan kepada DA1 bertarikh 27 Mac 2004 ('DA3'), perjanjian tambahan untuk kerja-kerja pembangunan tambahan bertarikh 30 November 2005 ('ADW1'), perjanjian tambahan bertarikh 26 April 2006 ('ADW2'), dan perjanjian tambahan untuk kerja-kerja pembangunan tambahan baharu kepada DA1 bertarikh 26 April 2006 ('NADW'). Secara kronologi, ADW2 telah dilaksanakan oleh pihak-pihak enam bulan selepas pelaksanaan ADW1 dengan tujuan untuk meningkatkan faedah bercukai yang perlu dibayar di bawah ADW1 daripada 5% setahun kepada 7.5% setahun mengambil kira dakwaan tentang peningkatan dalam kadar pinjaman asas. Disebabkan oleh pelaksanaan ADW2 tersebut, plaintif terpaksa membayar bayaran tambahan sebanyak RM49.367 juta ('bayaran tambahan tersebut') kepada defendan di bawah ADW1. Untuk mendapatkan pembiayaan yang diperlukan untuk kerja-kerja di bawah ADW1 dan NADW, defendan telah memperbadankan Valid Ventures Bhd ('VVB') berhubung dengan ADW1, dan Free Zone Capital Bhd ('FZCB') bagi NADW. Butiran berkaitan ADW1 adalah seperti berikut: (a) kos yang ditanggung oleh defendan dalam menjalankan kerja-kerja di bawah ADW1 ialah RM510.38 juta; (b) defendan telah membiayai ADW1 melalui terbitan sekuriti hutang swasta oleh VVB dengan jumlah RM595.89 juta; dan (c) defendan akan menerima jumlah bayaran keseluruhan sebanyak RM677.123 juta daripada plaintif di bawah ADW1. Bagi NADW, butiran yang berkaitan adalah seperti berikut: (i) kos yang ditanggung oleh defendan dalam menjalankan kerja-kerja di bawah NADW ialah RM335.8 juta; (ii) defendan telah membiayai NADW melalui terbitan sekuriti hutang swasta oleh FZCB dengan jumlah RM410 juta; dan (iii) defendan akan menerima jumlah keseluruhan sebanyak RM522.584 juta daripada plaintif di bawah NADW. Pertikaian dalam kes semasa adalah berkaitan dengan keabsahan ADW2. Dalam hal ini, plaintif menegaskan bahawa ADW2 adalah terbatal dan tidak sah kerana tidak terdapat balasan manakala defendan berhujah bahawa ADW2 telah

dilaksanakan dengan balasan dan oleh itu adalah sah. Mengenai perkara ini, pernyataan pembelaan defendan mendedahkan bahawa balasan defendan di bawah ADW2 adalah aku janjinya untuk menanggung beban kewangan tambahan untuk membiayai kerja-kerja di bawah NADW, setelah bersetuju untuk membiayai kerja-kerja di bawah ADW1 yang akan menyebabkan tekanan kewangan kepada defendan. Isu dalam kes ini berkisar tentang sama ada perjanjian, ADW2 yang dimasuki antara plaintif dan defendan telah dilaksanakan tanpa balasan dan oleh itu terbatal dan tidak sah di bawah s 26 Akta Kontrak 1950. Mahkamah Tinggi mendapati bahawa ADW2 telah dilaksanakan dengan balasan dan oleh itu adalah sah. Mahkamah Rayuan tidak bersetuju dengan keputusan Mahkamah Tinggi dan berpendapat bahawa balasan tersebut tidak disebut secara jelas dalam ADW2, oleh itu, ADW2 adalah terbatal dan tidak sah kerana tiada balasan. Persoalan-persoalan undang-undang yang perlu diputuskan oleh Mahkamah Persekutuan adalah seperti berikut: (A) apabila terdapat dakwaan bahawa tiada balasan diberikan untuk perjanjian antara pihak-pihak, adakah balasan perlu dibuktikan hanya berdasarkan empat penjuru perjanjian tersebut atau boleh dibuktikan dengan keterangan ekstrinsik ('soalan 1') — berkenaan dengan keterangan ekstrinsik, defendan bergantung kepada surat bertarikh 19 April 2019 berkaitan kenaikan kadar faedah bercukai di bawah ADW1; (B) sama ada ujian 'practical benefit', seperti yang ditetapkan dalam *Williams v Roffey Bros & Nichollas (Contractors) Ltd* [1991] 1 QB 1 ('Williams v Roffey'), adalah undang-undang yang terpakai ('soalan 2') — berkenaan isu ini, defendan berhujah bahawa ADW2, yang merupakan variasi daripada ADW1, mempunyai 'practical benefit' misalnya penjimatan kos dan penyempurnaan projek mengikut masa yang ditetapkan disebabkan oleh penglibatan berterusan defendan; (C) sama ada pihak yang telah menyatakan niat mereka dengan jelas dengan memasuki hubungan undang-undang, terikat dengan perjanjian untuk mengubah perjanjian mereka sebelum ini apabila mereka telah bertindak ke atas perjanjian variasi tersebut ('soalan 3'); dan (D) sama ada doktrin estoppel patut digunakan terhadap responden (plaintif) apabila ia telah bersetuju dengan cadangan untuk menaikkan kadar faedah dan membuat pembayaran faedah tersebut tanpa apa-apa reservasi ('soalan 4').

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Rayuan dengan kos RM100,000 kepada responden (plaintif) tertakluk kepada alokatur:

(1) Berdasarkan keterangan, adalah jelas bahawa kos kerja-kerja di bawah ADW1 dan NADW ditanggung sepenuhnya oleh VVB dan FZCB melalui terbitan sekuriti hutang swasta. Oleh itu, defendan tidak perlu menanggung apa-apa kewajipan kewangan sendiri untuk menyiapkan kerja-kerja di bawah ADW1 dan NADW. Mahkamah mendapati bahawa peningkatan yang dikatakan dalam kadar pinjaman asas (yang tidak dibuktikan dalam perbicaraan) sehingga memerlukan pelaksanaan

ADW2, dan perlaksanaan kerja-kerja di bawah NADW, tidak akan menyebabkan apa-apa tekanan kewangan kepada defendan. Ini kerana, defendan telah mendapatkan pembiayaan yang berlebihan untuk menampung kosnya untuk menjalankan kerja-kerja di bawah ADW1 dan NADW dan defendan juga akan menerima balasan dalam bentuk keuntungan, yang melebihi pembiayaan tersebut. Selanjutnya, hujah kenaikan faedah bercukai dalam ADW2, sebenarnya, tidak dapat mengurangkan apa-apa tekanan kewangan yang didakwa pada masa yang material, iaitu, pada tahun 2006 memandangkan bayaran tambahan tersebut hanya dibuat pada Julai 2011 (lihat perenggan 33–34, 37–38, 44–45, 48 & 53–54).

(2) Menurut s 91 Akta Keterangan 1950, tiada keterangan boleh diberikan untuk membuktikan terma-terma kontrak, kecuali ia harus dikumpulkan dari empat penjuru kontrak itu sendiri. Jika pihak-pihak dibenarkan mengemukakan keterangan ekstrinsik untuk menyanggah niat atau kewajipan mereka selain daripada yang dinyatakan dalam kontrak, ia akan melanggar s 92 Akta Keterangan 1950. Dalam rayuan semasa, defendan tidak membuktikan keadaan-keadaan yang berkaitan di bawah mana-mana proviso dalam s 92 Akta Keterangan 1950 untuk membolehkan keterangan ekstrinsik diterima dalam pentafsiran ADW2 (lihat perenggan 69 & 72).

(3) Berkenaan dengan soalan 1, mahkamah mendapati bahawa: (a) surat bertarikh 19 April 2006 tersebut gagal menyatakan hubungan antara ADW2 dan NADW; (b) kedua-dua NADW dan ADW2 adalah perjanjian yang berbeza dan berasingan dan tiada rujukan (secara tersirat atau nyata) pernah dibuat dalam ADW2 kepada NADW; (c) memandangkan terma-terma ADW1, ADW2 dan NADW adalah berasingan dan berbeza, dan ia tidak dilaksanakan secara serentak, maka ia harus ditafsirkan secara berasingan; dan (d) perlaksanaan kewajipan kontrak yang sedia ada di bawah kontrak asal tidak boleh dianggap sebagai balasan yang mencukupi untuk apa-apa variasi yang berikutnya, yang bermaksud bahawa, balasan baharu sebagai tambahan kepada yang sedia ada perlu disediakan untuk menjadikan variasi tersebut mengikat — dalam hal ini, s 63 Akta Kontrak 1950 menyatakan bahawa jika pihak-pihak bersetuju untuk mengubah kontrak tersebut, kontrak asal tidak perlu dilaksanakan. Mahkamah berpendapat bahawa soalan 1 bukanlah berdasarkan keputusan Mahkamah Rayuan. Tiada keterangan ekstrinsik yang disandarkan oleh Mahkamah Rayuan dalam membuat keputusannya dan tiada keterangan ekstrinsik wujud untuk menyokong dakwaan bahawa terdapat balasan bagi ADW2. Oleh itu mahkamah enggan menjawab soalan 1 (lihat perenggan 68–69, 84, 90, 92 & 95–96).

(4) Berhubung dengan soalan 2, mahkamah mendapati bahawa:

(a) keputusan dalam *Williams v Roffey* adalah tidak konsisten dengan peraturan yang telah lama wujud bahawa balasan, sebagai harga janji yang dituntut, hendaklah berusul daripada penerima janji; (b) tiada kes Malaysia yang dilaporkan telah menerima penggunaan prinsip 'practical benefit' seperti yang ditetapkan oleh *Williams v Roffey*; (c) fakta dalam *Williams v Roffey* boleh dibezakan dengan rayuan semasa di mana dalam rayuan semasa, tiada keterangan yang dikemukakan oleh defendan bahawa ia tidak akan dapat melaksanakan kewajipannya di bawah ADW1 dan/atau memasuki NADW jika ADW2 tidak dilaksanakan; (d) plaintif tidak menerima manfaat praktikal daripada defendan dengan memasuki ADW2, tetapi hanya wujud manfaat kewangan tambahan kepada defendan; dan (e) adalah tidak wajar untuk menggunakan prinsip dalam *Williams v Roffey* kepada rayuan semasa kerana ia tidak pernah dibangkitkan di mahkamah bawahan. Memandangkan ujian 'practical benefit' dalam *Williams v Roffey* tidak pernah dibangkitkan, dibincangkan atau diadili di mahkamah bawahan, mahkamah dalam rayuan semasa enggan menjawab soalan 2 (lihat perenggan 103–108 & 116–117).

(5) Soalan 3 kelihatannya tidak mengendahkan peruntukan yang jelas dalam s 26 Akta Kontrak 1950 bahawa untuk peruntukan ini terpakai, perlu terlebih dahulu ada perjanjian yang dimasuki antara dua pihak. Tanpa kewujudan perjanjian, s 26 Akta Kontrak 1950 tidak perlu dipertimbangkan. Di bawah s 26 Akta Kontrak 1950, untuk menjadikan sesuatu perjanjian itu sah, perlulah ada balasan. Oleh itu, cadangan bahawa, memandangkan pihak-pihak telah berniat dan bersetuju untuk memasuki hubungan undang-undang dan bertindak atas perkara yang sama (untuk balasan tunggal daripada satu pihak sahaja), maka semua perjanjian tidak boleh dianggap terbatal, adalah bercanggah dengan s 26 Akta Kontrak 1950. Oleh itu mahkamah menjawab soalan 3 secara negatif (lihat perenggan 126–129).

(6) Doktrin estoppel tidak boleh mengatasi statut atau melindungi kepenyalahan undang-undang. Doktrin ini tidak boleh digunakan untuk mewujudkan kontrak yang boleh dikuatkuasakan tanpa balasan. Dalam kes ini, mahkamah mendapati bahawa: (a) defendan telah gagal untuk menunjukkan bagaimana mereka telah mengubah kedudukan mereka yang terikat dengan kontrak dan/atau kelakuan mereka disebabkan oleh ADW2; (b) plaintif tidak pernah bertindak ke atas ADW2 sebelum tindakan semasa dimulakan, kerana pembayaran yang perlu dibuat di bawah ADW2 hanya dibuat pada Julai 2011, kira-kira dua tahun selepas tindakan semasa dimulakan di Mahkamah Tinggi; dan (c) bayaran tambahan tersebut tidak boleh berjumlah kepada penepian hak plaintif memandangkan plaintif telah pun memulakan tuntutannya di mahkamah kira-kira dua tahun sebelum bayaran tambahan tersebut dibuat. Berdasarkan dapatan-dapatan di atas, mahkamah berpendapat

bahawa tidak boleh ada penggunaan doktrin estoppel dalam kes ini untuk mengalahkan tuntutan plaintif bagi pengisytiharan bahawa ADW2 adalah tidak sah menurut s 26 Akta Kontrak 1950. ADW2 yang terbatal tidak boleh disahkan melalui kelakuan pihak-pihak dan/atau oleh doktrin estoppel. Ia secara automatik terbatal kerana ketiadaan balasan. Mahkamah menjawab soalan 4 secara negatif (lihat perenggan 133, 142, 145, 148–149 & 151–153).]

Cases referred to

555 Film Sdn Bhd & Ors v Adamancy Construction Sdn Bhd [2023] MLJU 986, CA (refd)

Alexander Brogden and others v the Directors of the Metropolitan Railway Company (1877) 2 App Cas 666, HL (refd)

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, CA (refd)

Aspac Lubricants (M) Sdn Bhd(formerly known as Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri [2007] 6 MLJ 65, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Central London Property Trust v High Trees House Ltd [1947] KB 130, KBD (refd)

Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829, FC (refd)

Foakes v Beer [1881–85] All ER Rep 106, HL (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)

Guthrie Waugh Bhd v Malaiappan Muthuchumaru [1972] 2 MLJ 62, FC (refd)

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221, HC (refd)

Hughes v Metropolitan Railway Co (1877) 2 App Cas 439, HC (refd)

Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor [2004] 7 MLJ 513, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v TCY Jaya Sdn Bhd (formerly known as Sykt Tan Chang Yong Holding Sdn Bhd) [2024] 2 MLJ 362, CA (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49, PC (refd)

LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor [1987] 2 MLJ 52, SC (refd)

Manks v Whiteley [1912] 1 Ch 735, CA (refd)

Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)

Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd [2014] 11 MLJ 175, HC (refd)

Ooi Boon Leong & Ors v Citibank NA [1984] 1 MLJ 222, PC (refd)

Selectmove Ltd, Re [1995] 2 All ER 531, CA (refd)

Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor [2016] 5 MLJ 1, FC (refd)

Slipper v Berry Buddle Wilkins Lawyers [2015] NSWSC 810, SC (refd)

South Caribbean Trading Ltd v Trafigura Beheever BV [2004] All ER (D) 334 (Nov) (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324, CA (refd)
Stilk v Myrick (1809) 170 ER 1168 (refd)
Syros Shipping Co SA v Elaghill Trading Co The Proodos C [1981] 3 All ER 189, QBD (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129, FC (refd)
Whiteley v Delaney [1914] AC 132, HL (refd)
Wigan v Edwards (1973) 47 ALJR 586, HC (refd)
Williams v Roffey Bros & Nichollas (Contractors) Ltd [1991] 1 QB 1, CA (distd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)
Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR 1029, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)
Contracts Act 1950 ss 26, 63
Evidence Act 1950 ss 91, 92
Port Authorities Act 1963
Strata Management Act 2013

Appeal from: *Port Kelang Authority v Kuala Dimensi Sdn Bhd* [2024] 1 MLJ 252 (Court of Appeal, Putrajaya)

Porres P Royan (with Prem Ramachandran, Shaarvin Raaj a/l Selva Kumar and Craig Ho Wai Ping) (Kumar Partnership) for the appellant.
Nimalan Devaraja (with Wong Shun Yong) (Skrine) for the respondent.

Zabariah Yusof FCJ:

[1] The appeal before us relates to the issue of whether contracting parties can subsequently mutually agree to vary the terms of an initial agreement including the agreement with regards to consideration.

[2] In this judgment we will refer to parties, as they were, in the High Court. In the High Court, the appellant herein was the defendant whereas the respondent was the plaintiff.

THE ISSUE

[3] The issue in the courts below and before us revolves on whether the agreement, ADW2 entered between the plaintiff and the defendant was executed without consideration and therefore null and void under s 26 of the Contracts Act 1950.

[4] The full trial was conducted at the High Court which ended in the High Court holding in favour of the defendant, namely that ADW2 was executed for the practical benefit of the plaintiff (ie from the defendant to the plaintiff). To put it simply, the High Court held that ADW2 was executed with consideration and was therefore valid. This decision, was reversed by the Court of Appeal, which declared that ADW2 was null and void for want of consideration.

[5] The defendant was granted leave to appeal to this court premised upon the following questions of law:

(a) question 1: where it is alleged that there was no consideration for the agreement between the parties, is consideration to be proved only within the four corners of the said agreement or can the same be proved by extrinsic evidence?

(b) question 2: whether the practical benefit test, as laid down in *Williams v Roffey Bros & Nichollas (Contractors) Ltd* [1991] 1 QB 1, is good law?

(c) question 3: whether parties who had made their intention clear by entering into legal relations, are bound by an agreement to vary their previous agreement when they have acted upon the former, namely the variation agreement? and

(d) question 4: whether the doctrine of estoppel should be invoked against PKA, the respondent when it had agreed to the proposal to increase the interest rate and made payment of the same without reservation?

[6] We have heard oral as well as read the written submissions of both parties, and perused the cause papers on 21 August 2024. After due consideration, we unanimously dismissed the appeal with costs and affirmed the decision of the Court of Appeal. Hereinbelow are our full grounds for the said decision.

A BACKGROUND

[7] In 1993, the Government of Malaysia sought to develop and transform Port Klang into a national load centre and regional transhipment hub. To achieve this end, the Port Klang Free Zone ('PKFZ') project was initiated and approved.

[8] Port Kelang Authority ('the plaintiff') is a statutory corporation established under the Port Authorities Act 1963. The plaintiff had appointed Kuala Dimensi Sdn Bhd ('the defendant') as a turnkey contractor to construct and develop the PKFZ project.

[9] Following the defendant's appointment, the plaintiff and the defendant executed various contracts in relation to the PKFZ project, among others, namely:

(a) the development agreement dated 27 February 2003 ('DA1');

(b) the supplemental agreement dated 26 May 2003 ('DA2');

(c) the supplemental agreement to DA1 dated 27 March 2004 ('DA3');

(d) the supplemental agreement for the additional development works dated 30 November 2005 ('ADW1');

(e) the supplemental agreement for additional development works dated 26 April 2006 ('ADW2'); and

(f) the supplemental agreement for new additional development works to DA1 dated 26 April 2006 ('NADW').

[10] In this appeal, the relevant agreements for consideration are ADW1, ADW2 and NADW. The salient contractual terms of ADW1, ADW2 and NADW can be summarised as follows:

(a) ADW1: the defendant was appointed as turnkey developer to design, construct, finance and complete additional development works for the PKFZ project works, including works on junction improvements to the PKFZ, construction of electrical infrastructure and construction of a business-class hotel near the proposed exhibition centre. The defendant was, inter alia, required to finance and advance the additional development costs for the sum of RM510.38m, excluding the variation order (if any). The plaintiff would pay the defendant RM510.38m with interest at the rate of 5%pa payable according to payment schedule as set out in Schedule 1 of ADW1;

(b) ADW2: in less than six months after ADW1 was entered between the parties, the defendant requested from the plaintiff to increase the

chargeable interest under ADW1. The sole reason for this request by the defendant was due to a purported increase in base lending rate, and the long period of financing for ADW1 from 2001–2011. The defendant contended that the base lending rate which came into effect on 8 December 2005 was 6.25%pa but the lending rate for loans at the material time was between 7.25%pa to 7.75%pa As a result, both the plaintiff and the defendant agreed to revise the chargeable interest payable under ADW1 from 5%pa to 7.5%pa as requested by the defendant. This resulted in an additional payment obligation of RM49.367m by the plaintiff. There were no other changes made to the repayment terms;

(c) nothing was stated in any of the provisions in ADW2 of any consideration to be received by the plaintiff for its agreement to pay out the additional payment of RM49.367m to the defendant. Neither was it stated in ADW2 of the purported benefit to alleviate the defendant's financial strain for ADW1; and

(d) NADW: this agreement was entered between the plaintiff and the defendant on the same day when parties executed ADW2. Under this contract, the defendant was to design, construct, finance and complete new additional development works, which comprised of;

(i) concrete trenching at the costs of RM140.2m;

(ii) electrical works at the costs of RM80m;

(iii) civil infrastructure works at the costs of RM30m; and

(iv) road works at the costs of RM85.6m.

The plaintiff would pay the defendant RM335.8m with interest at the rate of 7.5%pa It is also to be noted that NADW never made any reference to ADW2.

[11] Although the plaintiff accepted the revised terms in ADW2, it claimed that the increase is invalid due to the absence of valuable consideration. The plaintiff filed an action at the High Court in 2009 seeking for a declaration that ADW2 was null and void for want of consideration.

AT THE HIGH COURT

[12] After a full trial, the High Court dismissed the plaintiff's action to void ADW2 for want of consideration and held that ADW2 was valid and enforceable between the parties.

[13] The High Court held that ADW1 and ADW2 should be read together, and therefore, the consideration for ADW2 is the completion of additional

works undertaken by the defendant under ADW1 (which was never pleaded by the defendant in its statement of defence) (refer to para 20 of the High Court judgment).

[14] The High Court also found that the parties' intention in executing ADW2 was to alleviate the defendant's financial strain to enable the defendant to carry out additional works under ADW1 and NADW.

[15] The plaintiff did agree to enter into ADW2 with the defendant in the first place. Hence, the plaintiff cannot subsequently challenge the validity of ADW2.

AT THE COURT OF APPEAL

[16] Aggrieved, the plaintiff appealed to the Court of Appeal. The plaintiff maintained its stand that ADW2 was null and void as it was solely for the defendant's benefit whilst the plaintiff gained nothing from it.

[17] There was nothing in the pleaded defence, either expressly or by implication, to suggest that the consideration for the interest rate increase for the defendant under ADW2 was the completion of works for the plaintiff under ADW1. The defendant's statement of defence disclosed that in consideration of the defendant agreeing to complete additional works under the NADW, the plaintiff agreed to increase the interest rate in ADW1.

[18] Hence, the High Court judge's finding that the consideration for ADW2 was the completion of the additional works under ADW1 was clearly misconstrued since the defendant did not plead this issue or fact. Parties are bound and must abide by their pleadings. Courts should decide on facts and issues in strict compliance with the pleadings filed by the parties. Should the courts decide on an issue not raised by the parties in their pleadings, the decision is liable to be set aside.

[19] The Court of Appeal referred to s 26 of the Contracts Act 1950 and ruled that an agreement made without consideration was void unless it falls under any of the three exceptions as stated in the aforesaid section. The court noted that none of the three exceptions are applicable to the factual matrix of the present case.

[20] The defendant argued that given that PKFZ project was a continuing development project spanning from 2003–2008 which involved a series of transactions and contracts between both parties, the agreements were one

composite contract and should be read together. ADW2 was executed to vary ADW1 and given that they should be read together, hence the want of consideration was a non-issue.

[21] However, the Court of Appeal was not persuaded by the argument of the defendant and held that the facts do not support that the agreements should be read together. The court found that ADW1 and ADW2 were not executed contemporaneously. Whilst ADW2 and NADW were executed on the same day, the terms in ADW1 and NADW involved separate and distinct scopes of work for separate and distinct considerations. The contractual obligations were supposed to be carried out by the parties at different times. There was no common objective to be achieved from these contracts. Hence, they cannot be read together.

[22] In support, the Court of Appeal referred to the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 which held that agreements could only be read together if they were executed contemporaneously and for one transaction. In that case, the Court of Appeal held that the four agreements there which were executed contemporaneously for the same transaction had the same effect as if they were one agreement, and a breach of any of the terms of one of the agreements triggered a breach of all the agreements.

[23] Consequently, the Court of Appeal ruled that, as ADW2 had to be read separately from ADW1, the consideration in ADW1 cannot be imported into ADW2.

[24] Even if ADW2 is to be looked at as a variation of ADW1, the Court of Appeal found that just as with any other agreement, a variation of an existing agreement had to be supported by consideration. The variation was in itself an agreement and the varied agreement formed a new agreement. The Court of Appeal found support for this proposition from *555 Film Sdn Bhd & Ors v Adamancy Construction Sdn Bhd* [2023] MLJU 986, where it was held that 'something of value must be given in exchange for the variation'. The court further affirmed the High Court's ruling in *Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd* [2014] 11 MLJ 175, which held, amongst others that: 'In many cases, consideration can be found in the mutual abandonment of the existing rights or the conferment of new benefits by each party on the other'.

[25] In the present case, as ADW2 merely conferred the benefit of extra interest of 2.5%pa to the defendant without any reciprocal benefit to the

plaintiff, the Court of Appeal held that ADW2 was void for want of consideration. The court ordered the defendant to return the payments received under ADW2.

[26] The issue of estoppel which the defendant raised could not operate against the clear requirement for consideration in a valid contract as statutorily provided under s 26 of the Contracts Act 1950 unless the contract falls under any of the exceptions mentioned therein, which was not the case here. Therefore, the plaintiff was not estopped nor precluded from raising this issue to challenge the validity of ADW2.

ANALYSIS AND DECISION

The pleaded defence of the defendant

[27] The defendant acknowledged in their submissions that their statement of defence (paras 3.6.3, 5.4 and 5.4 of the defence) disclosed that the consideration was its undertaking of the *additional financial burden of financing the new additional development works under the NADW*, having already agreed to finance the additional development works under the ADW1.

[28] These were elaborated in para 5.3 of the statement of defence where the defendant pleaded that the undertaking of the new additional development works and advancing the costs and expenditure of the same would cause the defendant *financial strain* as the defendant was already financing the works under the ADW1. Further, the defendant also undertook the risks involved in the completion of the works under ADW1 and NADW.

[29] Therefore, the defendant submitted that the learned trial judge's findings that the consideration for ADW2 was the completion of the additional works under ADW1 was clearly misconstrued since the defendant did not plead this issue of fact.

[30] In determining whether the pleaded defence of the defendant (ie that the defendant was in a financial strain when it undertook the new additional development works and advancing the costs and expenditure of the same would cause the defendant *financial strain* as the defendant was already financing the works under the ADW1), stands up to scrutiny, it is important to look at the financial obligation of the defendant in carrying out the contracts under ADW1 and NADW.

Financial obligation of the defendant in carrying out the contract under ADW1

[31] To raise the required financing to enable the defendant to finance the additional development works or any variation orders under ADW1, the defendant had incorporated Valid Ventures Bhd ('VVB') as a Special Purpose Vehicle on 1 December 2005. VVB is the wholly-owned subsidiary of the defendant.

[32] Subsequently, vide an absolute legal assignment dated 24 February 2006 entered into between the defendant and VVB, the defendant agreed to absolutely assign to VVB the annual repayment of the additional development costs (as defined in ADW1) by the plaintiff.

[33] From 3 March 2006–12 December 2008, VVB issued approximately RM545m in private debt securities, which were secured against the amount payable by the plaintiff to the defendant under ADW1.

[34] Hence, from the aforesaid, it is clear that, the costs of the additional development works were fully covered by the abovementioned financing. Evidently, the defendant did not have to incur any financial obligation on its own to complete the works under ADW1.

Financial obligation of the defendant in carrying out the contract under NADW

[35] In order to raise the financing for the new additional development works, variation orders under NADW and for the defendant's professional fees, the defendant had incorporated Free Zone Capital Bhd ('FZCB') as a Special Purpose Vehicle on 21 February 2006. FZCB is the wholly-owned subsidiary of the defendant.

[36] Subsequently, pursuant to an absolute legal assignment dated 12 September 2006 entered into between the defendant and FZCB, the defendant agreed to absolutely assign to FZCB the annual repayment of the new additional development costs (as defined in NADW).

[37] On 26 September 2006, FZCB issued approximately RM410m in private debt securities secured against the amount payable by the plaintiff to the defendant under NADW to finance the New Development Works. This amount was:

(a) higher than the costs incurred for carrying out the new additional development works; and

(b) lower than the total sum to be paid to the defendant by the plaintiff under NADW.

[38] Given the aforesaid, the defendant did not have to incur any financial obligation on its own to complete the works under NADW.

Whether the defendant suffer any financial strain from carrying out works under ADW1?

[39] From the contemporaneous documents:

(a) under ADW1, the defendant was to receive a total amount of RM677.123m over a period of five years (from July 2007–July 2011); and

(b) the costs to be incurred by defendant in carrying out the additional development works was stipulated as RM510.38m in ADW1.

[40] The defendant was to be paid approximately RM166.743m over and above the stipulated cost for the additional development works. This sum is without taking into account:

(a) the additional payment to be made under ADW2; and

(b) the defendant had financed ADW1 through the issuance of private debt securities by VVB for the sum of RM595.89m. The private debt securities was secured against the amounts to be paid to the defendant by the plaintiff under ADW1. The total financing raised by VVB was:

(i) approximately RM85m more than the total costs of the works to be carried out by defendant under ADW1; and

(ii) RM82m less than the total consideration paid by the plaintiff under ADW1.

[41] It would appear that the financing raised by VVB was more than adequate to cover the costs of ADW1, which does not support the argument of a financial strain on the defendant from carrying out works under ADW1.

[42] In addition, the defendant's own witness, Stephen Abok had also admitted under cross-examination that the increase of the base lending rate has no impact on the financing of ADW1.

[43] Neither was there any evidence that the coupon rate for the private debt securities issued by VVB will be affected by the base lending rate. In fact, the interest rate which the defendant had sought for under ADW2 (7.5%pa) was 25–50% higher than the coupon rate for the private debt securities (5% to 5.9%pa).

[44] Given the aforesaid, there is no doubt that the total financing raised by VVB was more than sufficient to cover the projected cost of the works under ADW1. A

[45] In the same vein, the total original repayment sum of RM677.123m from the plaintiff under ADW1 was also more than sufficient to cover the projected costs for ADW1, and RM82m more than the total financing raised by VVB. B

[46] VVB has even set up an escrow account to address any shortfall in the repayment sum due to, among others, any adverse movement in interest rates during the tenure of the medium-term notes. The said escrow account was to have funds in the sum of RM47.6m. C

[47] There was no document adduced to show that the sum in the escrow account was insufficient to cover any shortfall thereby requiring ADW2 to be executed. D

[48] Given the aforesaid, the basis of the financial strain incurred by the defendant due to a purported increase in the base lending rate (for which no evidence was led at trial), so as to require the execution of ADW2, was certainly without merit. E

Whether the defendant suffer any financial strain to carry out works under NADW F

[49] ADW2 and NADW were executed between the plaintiff and the defendant on the same day. NADW clearly provides for a chargeable interest rate at 7.5%pa which was the same interest rate as in ADW2. This should have covered any alleged financial burden suffered by the defendant for entering into NADW which was within the knowledge of the defendant at the time of entering into NADW. Therefore, logically, there was no reason for the defendant to enter into a separate and unrelated agreement, ADW2, on the same day to address the purported financial strain. G

[50] If the said chargeable interest rate under NADW was insufficient at that time when it was executed, it was well within the defendant's rights to request for a higher interest rate specifically for NADW. However, that was not the case and the defendant seemed to be satisfied with the interest rate of 7.5%pa when NADW was executed. Accordingly, there was no reason for the defendant to seek to obtain more money for the works which it had already agreed to carry out under ADW1. H I

[51] Therefore, the assertion of a purported financial burden being undertaken by the defendant due to NADW has no merit. In addition, the

defendant had incorporated a Special Purpose Vehicle known as FZCB on 21 February 2006 for the purpose of raising the required financing for the defendant to finance the new additional development works. In consideration for this, the defendant had assigned the total repayment sum under NADW to FCZB. The impact is that, the defendant did not incur any financial burden to perform the works under NADW. This was admitted by Stephen Abok in his testimony that the costs under NADW will be easily covered by the financing raised by FZCB.

[52] Under NADW, the stipulated cost to the plaintiff for carrying out the new additional development works was RM335.8m. To finance the above new additional works, FZCB had issued approximately RM410m in private debt securities secured against the amount payable by the plaintiff to the defendant, thereby more than covering the costs to be incurred. Further, under NADW, the plaintiff was to pay the defendant approximately RM522.584m for carrying out the new additional works. This was approximately RM200m more than the total financing raised by FZCB on the defendant's behalf.

[53] Therefore, the performance of works under NADW would not have caused any financial strain to the defendant. The defendant had raised excess financing to cover its costs for carrying out the works under NADW pending receipt of payment from the plaintiff and was due to receive consideration in the form of profit, which is in excess of the financing.

The timing of the payment of RM49.367m in July 2011

[54] It has been established that the net effect of ADW2 was that, the last repayment sum due in July 2011 by the plaintiff to the defendant under ADW1 was increased from RM107.123m to RM156.49m (an additional payment of RM49.367m). This additional payment was only made in July 2011, which was five years after the parties entered into ADW2 and NADW, and after the works under both ADW1 and NADW had been completed. Looking at the timing, the argument of the increase in chargeable interest in ADW2, factually, could not have alleviated any purported financial strain at the material time.

[55] The witness for the defendant, Stephen Abok had also admitted that the request for a variation of the chargeable interest rate was made before financing was secured for ADW1. At that time the defendant was concerned that financing would not be secured and that it would need to borrow monies to carry out the works.

[56] However, such concern was without basis as can be seen from the financing that was secured for ADW1, thus rendering the request for the

increase in the chargeable interest rate and ADW2 unnecessary. In fact, in March 2020, approximately one month before ADW2 was executed, VVB had already issued the bonds for the financing of the PKFZ project. Therefore, there was no need for the defendant to borrow to finance the project and consequently, such risk as set out in its letter dated 10 February 2006 did not materialise.

[57] Despite the fact that there was more than adequate financing available, there was no evidence of the defendant informing the plaintiff of this when ADW2 was executed.

[58] It is also pertinent to mention here that the testimony of Stephen Abok in re-examination affirmed that the defendant's request at the time for the execution of ADW2 was predicated on a hypothetical risk. He testified that:

> It's because ADW1 was signed in October 2005. So, the agreement that they signed was only bearing an interest rate of 5%. The interest rate that was given in the agreement will not be sufficient to cover the interest that KDSB *were to borrow to finance the project.*

[59] It would appear that the defendant's basis for the request for the increase under ADW2 was for a hypothetical and speculated loss, which did not occur. Based on the timeline of events as aforesaid, the financing for ADW1 had been secured even before the execution of ADW2.

[60] Hence, undeniably, the variation in the chargeable interest rate under ADW2 was not to alleviate the defendant's financial strain for performing its existing obligations under ADW1, which the defendant was already due to receive adequate and satisfactory consideration.

[61] Stephen Abok had also admitted that any financial strain suffered by the defendant was not caused by the plaintiff. In addition, he was unable to explain how ADW2 assisted the defendant with its 'financial strain' in 2006 as the increase in payment would only arrive in 2011.

[62] Hence, the assertion of a financial strain by the defendant is clearly without basis and does not stand on scrutiny. The pleaded defence of the defendant that the consideration was its undertaking of the *additional financial burden* of financing the new additional development works under the NADW, having already agreed to finance the additional development works under the ADW1, failed to be proven.

[63] As there is no financial strain on the defendant, the issue of whether practical benefit would amount to sufficient consideration to the plaintiff, need not be considered. However, for completeness, we will still address the same when we answer question 2.

[64] With the above evidentiary and factual matrix before this court, we will now proceed to answer the questions posed.

Question 1

[65] The defendant argued that question 1 deals with the issue of whether consideration (something of value exchanged between parties) for a contract must be proven solely through the text of the agreement or of extrinsic evidence. In this case, the government approved additional works for the defendant and established a 7.5% interest rate on the costs associated with this work. The plaintiff and defendant had mutual promises outlined in their offer letters and agreements. The Court of Appeal concluded that the consideration for the agreements was not explicitly mentioned in the agreement (ADW2), leading to the decision that there was no valid consideration.

[66] It was further argued by the defendant that previous cases have established that consideration can be proven with extrinsic evidence beyond just the agreement's text. Courts have allowed additional evidence to establish what consideration was given, even if it is not explicitly detailed in the agreement. Therefore, the defendant argued that consideration should indeed be proved with evidence outside the agreement, not just by its text. The conclusion sought is that if it is claimed there was no consideration, it should be possible to demonstrate otherwise with external evidence.

[67] We were urged to look for extrinsic evidence by referring to some contemporaneous documents to support the contention by the defendant that there was consideration in ADW2 because it would not be able to carry out the works under ADW1 or NADW if ADW2 was not entered into.

[68] On this extrinsic evidence, counsel for the defendant firstly, referred us to the letter dated 19 April 2006 from the plaintiff to the defendant to support this contention. However, a perusal of the aforesaid letter failed to state the nexus between ADW2 and NADW as asserted by the defendant. The contents of the letter are in respect of two separate and distinct subject matters, which have no mutual reference to each other. Nothing in the letter to say that ADW1 and NADW are connected. The correspondence is in relation to the defendant's request for the increment of chargeable interest rate provided for ADW1 which resulted in ADW2, because of an alleged increase in the bank

lending rate which the defendant felt justified in asking for the increase in the chargeable interest rate in ADW1. It has no connection at all with the parties' negotiation for NADW.

[69] Secondly, both NADW and ADW2 are distinct and separate agreements with their own set of contractual terms. No reference (impliedly or expressly) was ever made in ADW2 to NADW. It is trite law that, where the terms of a contract have been reduced to writing, as in this particular agreement, the contract could only be proved by the document itself, and it is not open to the defendant to seek to introduce and for the court to admit evidence that would, inter alia, add new terms to it. Pursuant to s 91 of the Evidence Act 1950, no evidence shall be given to prove the terms of the contract, except that it should be gathered from the four corners of the contract itself. If parties are allowed to adduce extrinsic evidence to contradict their intention or obligations other than as stated in the contract, it would be in violation of s 92 of the Evidence Act 1950 (refer to *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129).

[70] Section 92 of the Evidence Act 1950 allows for extrinsic evidence to be adduced, if it falls under any of the provisos of the said section. The defendant did not plead any of the provisos that should apply to their case, which is fatal as explicitly stated by Lee Hun Hoe CJ (Borneo) in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229:

> It is not the case of the respondent that any of the provisos to s 92, except possibly proviso (a), applies. Its contention therefore for the admission of the parol evidence which won the approval of the learned judge was that not all the terms had been incorporated in the agreement. If this contention so generally stated and understood had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law. I think and I say so with respect, the fundamental mistake made by the learned judge is to conclude simply and without qualification that s 92 applies only to a case where all the terms of the agreement have been reduced to writing. But that is not what s 92 says. It merely says 'where the terms ...' and by referring back to s 91, it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, inter alia, add new terms to it.
>
> However, s 92 allows, so far as it concerns this particular case, evidence in proviso (b) of 'any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms' and in proviso (c) of 'any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract. ...' The provisos qualify but do not eliminate the main

provisions of the section, so that *unless the additional evidence sought to be adduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agreement.* It will be readily seen that the evidence which the respondent sought to introduce did not fall within either of these two provisos but was evidence adding a new term or terms to the agreement. (Emphasis added.)

[71] VK Rajah in the Singapore Court of Appeal Case of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 set out the circumstances and the relevant principles when admitting extrinsic evidence when His Lordship considered similar provision which is in pari materia with the provision in our Evidence Act 1950. However, His Lordship cautioned and reiterated that:

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy ...

[72] However, in the present appeal, the defendant has not made out the relevant circumstances under any of the provisos in s 92 to enable extrinsic evidence to be admitted in the interpretation of ADW2.

[73] If the pleaded defence of the defendant is taken to be true, it begs the question of why was it not included as an express representation to that effect in either agreement, considering the importance placed by the defendant on that very representation for the execution of the agreements.

[74] Taking into account that the defendant is a well-known corporation engaged in a big project like the PKFZ project and being advised by a reputable law firm, surely the necessary important terms of intention and relationship would have been inserted in the ADW2 and NADW. The absence of such a critical and important term to justify the interpretation as is now being suggested by the defendant before us is very much telling, that the pleaded defence of the defendant is purely an afterthought.

[75] Applying the principle as aforesaid, from the four corners of ADW2, there is no consideration due to the plaintiff for entering into ADW2.

[76] The defendant relied on the Federal Court case of *Guthrie Waugh Bhd v Malaiappan Muthuchumaru* [1972] 2 MLJ 62 wherein the defendant relied on the passage where the Federal Court through Ong CJ (Malaya) upheld the findings by the trial court that further consideration could be proved by parol evidence. The judgment was quoted as such at p 65:

It would seem clear that the learned judge directed the pleadings to be amended to

bring out the real issue between the parties, because he held that the defendant's preliminary objection as regards absence of consideration for the deed was not a real one if one read it along with the other correspondence. As regards consideration he held, in my opinion quite rightly, that:

(a) further consideration consistent with the deed could be proved by parol evidence;

(b) he was entitled to look at the whole of the correspondence which preceded the contract to see what the promise was;

(c) ...

(d) it was not necessary that there should be an arrangement for forbearance for any definite time; it was enough if from surrounding circumstances a request for forbearance could be implied.

[77] This reliance by the defendant on this part of the judgment is misplaced, because what the trial court judge, Sharma J stated in the said case was that, the amount or nature of consideration is not to be proved by extrinsic evidence. This is evident from the judgment at p 37 of the judgment:

Under proviso (a) evidence may be adduced as to want or failure of consideration. This is, however, totally distinct from the amount or nature of consideration. If the amount or nature of consideration could be proved by oral evidence to be other than that stated in the document, there seems no reason why this was left out from proviso (a). A statement in a document that a consideration has been paid no doubt is a recital in a deed and does not constitute one of the terms of the contract but the amount of consideration is certainly a term of the contract in a sale deed and therefore it cannot be open to a party to prove a variation in the amount of consideration. *Consideration is undoubtedly a term — and a very important term — in a contract of sale.* A sale deed may mention a consideration for the transfer of the property. *A deed of gift may mention that the term of the transfer of the property is that there is no monetary consideration. In a deed of gift it is not open to a party to prove that although the terms of the deed say there was no monetary consideration, still the term was different from what was stated in the document and that there in fact was a monetary consideration for the document. It amounts to contradicting an important term of the deed.*

[78] The reliance by the defendant on *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 is also misconceived. The facts in the said case are at variance with the present appeal. The extrinsic evidence relied therein was deemed admissible to show that, although the agreement provided a consideration, the actual circumstances were that there was no consideration paid.

[79] Compared to the present appeal, the defendant attempted to rely on extrinsic evidence to show there was consideration when the agreement itself was silent.

[80] The sole witness for the defendant, Stephen Abok admitted in his testimony that there was no mention of the plaintiff receiving consideration in ADW2, when it was entered into. In fact, Steven Abok was not involved in the negotiations of the various agreements which are the subject matter of this appeal. There was no attempt by the defendant to call the relevant persons who were actually involved in the negotiation of ADW2 and NADW.

[81] It appears that the agreements, even if read together failed to indicate that the execution of ADW2 was necessary for NADW to be executed.

[82] Apart from there being no nexus between the agreements, this does not aid the defendant in furthering its contention on the issue of financial strain. There was no reference to any form of financial strain experienced by the defendant and none of the letters leading to the execution of ADW2 and NADW mentions that the defendant was under a financial strain or that the defendant has undertaken and/or completed the works for ADW1 or NADW without a variation in the interest rate for ADW1.

[83] The defendant contends that all contracts relating to PKFZ should be looked at as a whole and to be read together as they formed one composite contract. We found no merits in this argument for the following reasons:

(a) the contracts, except ADW2 and NADW, were not executed simultaneously. Despite ADW2 and NADW were executed on the same day, the additional works to be carried out by the defendant in ADW1 and NADW were totally different. There was no mention by the parties to incorporate into, or even mention ADW2 in NADW, and vice versa;

(b) ADW1 and NADW involved separate and distinct scopes of works for separate and distinct considerations, even though they are of the same PKFZ project;

(c) the considerations and obligations and terms are different and the works to be carried out by parties are at different times;

(d) there is no common objective to be achieved from these contracts; and

(e) a breach of any of the terms of the contracts would not trigger a breach of all of the contracts relating to the PKFZ project.

[84] As the terms of the contracts, namely ADW1, ADW2 and NADW are separate and distinct, and they were not executed simultaneously, hence they should be construed separately.

[85] We find support in such a proposition on the well-established principle that if the transaction is contained in several documents, all executed

simultaneously between the same parties, they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In *Manks v Whiteley* [1912] 1 Ch 735 at p 754, the dissenting judgment of Moulton LJ which was approved on appeal by the House of Lords in *Whiteley v Delaney* [1914] AC 132 stated:

> Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole.

[86] This principle has been followed by Raja Azlan Shah J in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165.

[87] Hence, the argument by counsel for the defendant that it must be inferred from all the contractual documents (that is to be read together) that consideration exists, is too far fetch.

[88] The defendant has not made out the relevant circumstances to admit any extrinsic evidence to interpret ADW2.

[89] It is also contended by the defendant that ADW2 was executed to vary the interest rate and repayment sum in ADW1. Hence, parties are still bound by the terms of ADW1 except for the provision of the increase in interest rate and repayment sum payable by the plaintiff, which should follow what has been agreed upon.

[90] However, even if ADW2 is to be taken as a variation of ADW1, that does not absolve of the requirement of a valid consideration from the defendant to the plaintiff in ADW2. In this respect we refer to s 63 of the Contracts Act 1950 which states that if parties agree to alter the said contract, the original contract need not be performed. When the plaintiff and the defendant here altered the rate of interest in the original contract ADW1, essentially, they are altering the original contract. As a result, a new contract is formed, ie ADW2. If the parties cannot establish all the elements of a valid contract in ADW2, the agreement is void and the parties' obligations are only confined to the original contract (refer to the FC case of *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9 at p 16).

[91] It is trite that in contract law, the validity of a variation can be subject to challenge if there is no such consideration. The issue of variation of contract and the requirement of consideration is extensively explained by the Court of Appeal in *555 Film Sdn Bhd & Ors v Adamancy Construction Sdn Bhd* [2023]

MLJU 986. For a variation to be contractually binding, all of the legal requirements to form a valid contract, including the provision of valuable consideration by each party.

[92] The general rule is that past consideration is not sufficient consideration and traditionally, a promise to perform an existing obligation will not be good consideration (see *Wigan v Edwards* (1973) 47 ALJR 586 at p 594). In other words, the performance of existing contractual obligations under the original contract is not to be taken as sufficient consideration for any subsequent variation. This means, fresh consideration in addition to that already owing will need to be provided for the variation to be binding.

[93] In the Supreme Court case of *LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52 which held that 'novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, the rights and obligations under it are not those transferred from the old contract which is already extinguished'.

[94] Therefore, even if ADW2 is a variation of ADW1 as was termed by the defendant, it still requires consideration for it to be valid.

[95] Given the aforesaid, question 1 is not premised from the decision of the Court of Appeal. There was no extrinsic evidence relied upon by the Court of Appeal in arriving at its decision and neither was there any extrinsic evidence present to support the assertion that ADW2 is supported by consideration.

[96] We therefore decline to answer question 1.

Question 2

[97] Question 2 makes specific reference to the practical benefit test, as laid down in the case of *Williams v Roffey Bros & Nichollas (Contractors) Ltd* [1991] 1 QB 1 and whether the test as stated therein, is good law? It is to be borne in mind that this case was never addressed nor discussed by either the High Court or the Court of Appeal.

[98] The aforesaid question is an attempt by the defendant to extend the application of the principle in *Williams v Roffey* to practical benefits obtained for a separate contract, ie, from the defendant proceeding with works under NADW, (which we have alluded to, in the previous paragraphs of this judgment) are distinct and separate from the works under ADW1.

[99] The defendant relied on this case to assert that the plaintiff had received a practical benefit from ADW2 which amounts to a consideration for the same.

[100] Hence, to address this question, it is important to analyse the practical benefit test as established in *Williams v Roffey Bros & Nichollas (Contractors) Ltd* [1991] 1 QB 1. In this case, the English Court of Appeal held that a promise to make extra payments under a contract could be supported by consideration if it provided a practical benefit, even if the party making the promise was already obligated under the original contract. The case involved defendants who promised additional payments to a subcontractor due to concerns about timely completion, and the court found that the practical benefit to the defendants from avoiding delays constituted valid consideration.

[101] Other jurisdictions like Singapore, New Brunswick, New Zealand, and Hong Kong have affirmed its principles by taking the approach as in *Williams v Roffey Bros*, emphasising that a practical benefit can serve as a valid consideration.

[102] In the present appeal, it was argued by the defendant that the ADW2 agreement, which was a variation of ADW1, was supported by practical benefits such as cost savings and timely project completion due to the defendant's continued involvement. The defendant argued that the COA, however, failed to apply the practical benefit test, which led to an erroneous conclusion about the consideration. If the Court of Appeal had applied this test, it would have shown that due to the practical benefits to the plaintiff, the ADW2 was indeed supported by consideration. Therefore, the defendant urged this court to affirm that the practical benefit test is still valid and applicable in the present appeal.

[103] The decision in *Williams v Roffey Bros* is inconsistent with the long standing rule that consideration, being the price of the promise sued upon, must move from the promisee (refer to *Stilk v Myrick* (1809) 170 ER 1168 and *Foakes v Beer* [1881–85] All ER Rep 106 which is a House of Lords' decision, which expressly said that a practical benefit was not good consideration in law). It departed from the previously established principle that promises to perform pre-existing contractual obligations could not be good consideration. A different constituted English Court of Appeal in *Re Selectmove Ltd* [1995] 2 All ER 531 declined to follow *Williams v Roffey*. Similarly, the English Commercial Court in *South Caribbean Trading Ltd v Trafigura Beheever BV* [2004] All ER (D) 334 (Nov) set out its hesitance on the application of the principle as enunciated in *Williams v Roffey*. Even in Australia, in *Slipper v Berry Buddle Wilkins Lawyers* [2015] NSWSC 810 affirmed the general rule that to perform an existing duty is not fresh consideration.

[104] There are no reported Malaysian cases that have accepted the application of the 'practical benefit' principle as set out by *Williams v Roffey*. Gopal Sri Ram JCA in the Court of Appeal case of *Aspac Lubricants (M) Sdn Bhd(formerly known as Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 MLJ 65 prefer to exercise caution on its applicability, due to the criticism and the hesitancy of the commonwealth jurisdiction in accepting the principle enunciated in *Williams v Roffey*:

> [10] If the wrappers in *Chappel* amounted to consideration in law, I am unable to see why the customers' item in this case do not. I must add that the law on the subject has not been at a standstill and that has been considerable movement since the decision in *Chappel*. It has now been accepted that even a practical advantage obtained by a promisor in a bargain is good consideration to support the promise: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; ... But *Williams v Roffey Bros* has not gone without criticism (see *Halson* 106 LQR 183; *Andrew Phang* 107 LQR 21:
>
> > *Adams & Brownsword* 53 MLR 536; *Chen-Wishart* 14 NZULR 270; *Hird & Blair* [1996] JBL 254) and I must say, for myself, that the full impact of that decision is yet to be felt. A time may come when its correctness may fall to be tested.

[105] We agree with the submission by the plaintiff that it would not be appropriate to apply the principle in *Williams v Roffey* to the present appeal as it was never raised in the courts below. The full impact of the case was never argued and adjudicated in the courts below and the lack of clarity on the application of the principle.

[106] In any event, the facts in *Williams v Roffey* and our present appeal have their differences. There, the facts are such that, in the event the plaintiff was in financial difficulty and unable to complete the works, the defendants would be liable under a penalty clause to the main contract, unless there was an increase in payment. In that context, the court there had made findings of facts in the determination of the issue which were relevant, namely:

(a) the subcontract price agreed upon was too low to enable the plaintiff to operate satisfactorily and at a profit; and

(b) the defendant's surveyor had affirmed that the subcontract price was indeed too low.

[107] Hence, there was a practical benefit to the defendant to ensure the plaintiff completed its contractual obligation.

[108] In our present appeal, there was no evidence led by the defendant that it would have been unable to perform its obligations under ADW1 and/or enter into NADW if ADW2 was not executed.

[109] There was nothing in the contents of the letter dated 10 February 2006 from the defendant stating them having faced any financial strain to carry out the works under ADW1 and/or NADW. What was stated in the letter was a request for an increase in the chargeable interest rate for ADW1 which later led to the execution of ADW2. It was solely on the basis that defendant would be taking a financial risk due to the long financing period (from 2006–2022) and the purported increase in the base lending rate. Even these 'basis' or reasons alleged by the defendant were rebutted under cross-examination when Stephen Abok testified that the increase in the base lending rate had no adverse impact on the financing of ADW1. In his witness statement he confirmed that all the financing risk was assumed by the defendant.

[110] Hence, there was no reason for the plaintiff to have the financial risk passed on to it under ADW2.

[111] We have elaborated in great length in the earlier part of this judgment that, there was no evidence of any financial strain on the defendant, be it under ADW1 or NADW. It is rather the reverse, ie that the defendant would have made substantial profit under both ADW1 and NADW, even without ADW2. Under ADW1 the defendant was to receive a total amount of RM677.123m over a period of five years. The costs to be incurred by the defendant in carrying out the additional development works was stipulated as RM510.38m in ADW1. Hence, the defendant was to be paid approximately RM166.743m over and above the stipulated cost for the additional development works, even without taking into account the additional payment to be made under ADW2.

[112] In addition, it is undisputed that the defendant had financed ADW1 through the issuance of private debt securities by VVB for the sum of RM595.89m. The private debt securities were secured against the amounts to be paid by KDSB by PKA under ADW1.

[113] We have alluded in the preceding paragraphs of this judgment, that the financing raised by VVB was more than adequate to cover the projected costs of the works under ADW1, which therefore put paid to the argument on the financial strain allegedly incurred by the defendant.

[114] There was also evidence from Stephen Abok that the request for a variation of the chargeable interest rate was made even before financing was secured for ADW1. At that time the defendant was concerned that financing would not be secured and that it would need to borrow monies to carry out the works.

[115] It is also undisputed that financing was secured for ADW1 thus rendering the request for ADW2 redundant. VVB had issued the bonds for the

financing of the PKFZ project in March 2020, one month before ADW2 was executed. Hence, there was no requirement for the defendant to borrow to finance the project and as a result such risk as set out in the letter dated 10 February 2006 did not happen.

[116] From the aforesaid, there was no practical benefit to the plaintiff by the defendant, by entering into the ADW2, but only an additional monetary benefit to the defendant.

[117] As the practical benefit test in *Williams v Roffey* was never raised, discussed or adjudicated in the courts below, we decline to answer question 2.

Question 3 and question 4

[118] We will address questions 3 and 4 together as they are related and appear to overlap. Question 3 relates to the issue of whether parties who have clearly expressed their intention by entering into a legal agreement are bound by a subsequent variation when they have acted on the original agreement and the variation. Question 4 revolves on the issue of whether the doctrine of estoppel should prevent the plaintiff from challenging the validity of an agreement to increase the interest rate, given that the plaintiff had accepted the new terms and made payment without reservation.

[119] The defendant argued that, since consideration was present in ADW2 and the plaintiff had acted on it, the parties are bound by the variation. Following the execution of ADW2, the plaintiff acknowledged and accepted payment notices reflecting the agreed interest rate of 7.5% and issued a cheque including this rate without reservation.

[120] Despite the plaintiff accepting the new terms and made payment without reservation, the Court of Appeal found that estoppel cannot override statutory provisions, especially those meant to protect the public, and cannot negate the requirement for consideration under the Contracts Act 1950.

[121] The defendant submitted that the Court of Appeal fell into error when it arrived at its findings, for the reason that the provisions in the Contracts Act 1950 do not prohibit the application of the doctrine of estoppel.

[122] In addition the defendant submitted that the doctrine of estoppel cannot itself provide any obstacle to the application of the principle of promissory estoppel although the promise may not be supported by consideration in the strict sense.

[123] Before we proceed to address questions 3 and 4, it is important to note

our findings in the preceding paragraphs that ADW2 was without consideration. This is important to be borne in mind, because, the defendant still persists in its argument when addressing questions 3 and 4 that, *since consideration was present in ADW2* and the plaintiff had acted on it, the parties are bound by the variation.

[124] These two questions bring to the forefront the effect of s 26 of the Contracts Act 1950 and the doctrine of estoppel. From these two questions, the defendant seeks to assert a legal position that notwithstanding the clear statutory requirement under s 26 of the Contracts Act 1950, that a contract without consideration is void, the plaintiff should be restrained from challenging the validity of ADW2 because the plaintiff had:

(a) entered into ADW2; and

(b) made the resulting payment under the same after commencing these proceedings due to the formal demand from the defendant.

[125] Question 3 suggests that where a party has entered into legal relations, ie an agreement, they must be bound by it, even if they received no consideration for the same. The intent and purpose of question 3 is to assert that because ADW2 was prepared and agreed between the plaintiff and the defendant, it must be treated as binding on them.

[126] Question 3 appears to ignore the clear provision of s 26 of the Contracts Act 1950. Namely that for s 26 of the Contracts Act 1950 to even be applicable, there must first have been an agreement entered into between two parties. Without the existence of an agreement, s 26 of the Contracts Act 1950 need not even be considered.

[127] Under s 26 of the CA, for an agreement to be valid, there must be consideration. Section 26 of the CA provides that:

> An agreement made without consideration is void

[128] Therefore, the proposition that, since the parties had intended and agreed to enter into legal relations and acted on the same (for the sole consideration of only one party) all agreements cannot be deemed void, contradicts s 26 of the CA.

[129] We therefore answered question 3 in the negative.

[130] In addressing question 4, the defendant relied on the doctrine of estoppel to oppose the plaintiff's claim herein due to the fact that, prior to the

institution of the present action, the plaintiff had made payment of invoices which stipulated the interest rate of 7.5%pa

[131] However, this argument of the defendant ignores the fact that ADW2 had only increased the final payment sum due to the defendant in July 2011. All other payments made, prior to this final payment, were made in accordance with ADW1.

[132] The final payment sum, which included the RM49.367m due under ADW2, was made after the commencement of the present legal proceedings. Even so, this payment was made due to a formal demand by the defendant to the plaintiff. This was at a time when the defendant was aware of the challenge by the plaintiff to the validity of ADW2.

[133] It is a trite and fundamental principle of law that the doctrine of estoppel cannot prevail against a statute or protect against illegality. Ramly Ali FCJ, in the Federal Court case of *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1 (RBOA (1), pp 515–542), when considering provisions of the Companies Act 1965, held the following regarding the operation of the doctrine of estoppel against the same:

> [58] Estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law. This settled principle of law was adopted by Edgar Joseph Jr in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b when His Lordship ruled that: 'The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute, ... particularly when the noncompliance goes to the root of the thing'.
>
> [59] At p 356 of the judgment, His Lordship went on to say:
>
> > In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v Ashok Kumar Chopra*.

[134] A similar proposition was enunciated by Nallini Pathmanathan FCJ, in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829 (RBOA (1), pp 543–696) in considering the provisions of the Strata Management Act 2013, held that 'the trite and accepted position in this context is that estoppel is ineffective in the face of statute or the law ... Put another way, estoppel cannot override the law'.

[135] Estoppel is a flexible doctrine that aims to prevent unfairness, and it applies when parties act on an agreement, making it unjust for one to revert to previous terms. The defendant further submitted by referring to some English cases, amongst them are, the English Court of Appeal case of *Amalgamated*

Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, which supports the proposition that estoppel can be invoked if *a party has acted on a promise or representation*. It was submitted that the provisions of the Contracts Act 1950 are codifications of contract law and are not enacted for public benefit, thus not necessarily precluding the application of estoppel. The House of Lords in the case of *Alexander Brogden and others v the Directors of the Metropolitan Railway Company* (1877) 2 App Cas 666 highlights that *if parties act on an informal agreement*, it can be binding even if formal execution is pending. Additionally, the principles derived from the Privy Council case of *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 and the High Court case of *Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor* [2004] 7 MLJ 513 indicate that statutory provisions in the Contracts Act 1950 do not prevent parties from agreeing to terms that can be varied or excluded by mutual consent. The defendant therefore contended that the Court of Appeal erred in not recognising the binding nature of the ADW2 agreement and the applicability of estoppel.

[136] The doctrine of promissory estoppel is an extension of the common law estoppel by representation. It is an English doctrine of equity and in certain circumstances provides an exception to the principle of consideration which must exist to form a valid contract. It must be borne in mind that estoppel aims to prevent unfairness, and applies when parties act on an agreement, making it unjust for one to revert to original terms. As far as the law on promissory estoppel is concerned, it cannot by itself give rise to a cause of action. In other words, promissory estoppel cannot be used to create an enforceable contract because of the absence of consideration. It is only used as a shield. The origin and meaning of promissory estoppel were judicially explained in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at p 498 which are as follows:

> ... It's the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their consent enter upon a course of negotiation which has *the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealing which has thus taken place between the parties.* (Emphasis added.)

[137] There are parameters and limitations in the application of promissory estoppel. The doctrine is being applied more flexibly as compared to the time when it was first enunciated in 1887 through *Hughes v Metropolitan Railway Co* and further complemented through the case of *Central London Property Trust v High Trees House Ltd* [1947] KB 130. Now unconscionability is the main focus in granting promissory estoppel in lieu of the detrimental reliance as stated in the earlier cases. This doctrine has undergone rapid development and a clear indication of how promissory estoppel is being treated in the courts

is evident from the words of Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[138] It cannot be denied that there is the continuing evolution of promissory estoppel in the common law countries, Malaysia included, which has led to unclear parameters in the application of this doctrine as it is not provided in statutory form. Being an equitable doctrine, promissory estoppel cannot be freely interpreted and applied by the courts as compared to statutory provisions. The Malaysian courts have hinted at the inclination to recognise this doctrine to achieve and dispense justice as evidence from the judgment of Gopal Sri Ram JCA in *Boustead Trading Sdn Bhd* in the preceeding paragraph.

[139] Be that as it may, and despite what has been initiated in *Boustead Trading Sdn Bhd*, the application of this equitable principle of promissory estoppel should be dealt with objectively according to the circumstances of the case in order to do justice. In *Boustead Trading Sdn Bhd*, it was held that:

> The doctrine of estoppels is flexible principle by which justice is done according to circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not as a sword' does not limit the doctrine of estoppels to defendant alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

[140] From the case of *Central London Property Trust v High Trees House Ltd*, it was held that where a promise was made to excuse a party from contractual obligations, with legal intent, and where it was *both intended to be acted upon and was in fact acted upon, the promisor will be prevented from bringing evidence that there was consideration*. However, we opined that, in *Central London Property Trust v High Trees House Ltd*, although there was no stated consideration to reduce the rent as it was a one-sided gesture; it could be argued that, in the light of *Williams v Roffey*, that in the case of *Central London Property Trust v High Trees House Ltd* the benefit of not having the property standing empty during the war period, and having a reduced rent instead of none at all, was a benefit to the owners. This argument is similar to *Williams v Roffey* where the benefit to the builders was not having to look for new carpenters and avoiding the payment of a penalty to the owners of the building.

[141] In *Hughes v Metropolitan Railway Co*, Lord Cairns made a statement to

the effect that 'in the tradition of equity, if parties are in a contractual relationship, and one promises to excuse the other from strict legal duties, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties'.

[142] Essentially, the doctrine of estoppel cannot be relied on to create an enforceable contract in the absence of consideration. In the English High Court decision *Syros Shipping Co SA v Elaghill Trading Co The Proodos C* [1981] 3 All ER 189 (RBOA (1), pp 511–514) Lloyd J held the following regarding the operation of estoppel and consideration:

> The shipowners had no claim, other than by virtue of the agreement, for the $31,000 they were seeking to recover from the consignees, *and in the absence of consideration they could not enforce that agreement* or rely on equitable estoppel as creating an independent cause of action. (Emphasis included)

[143] It should be noted that this principle dates back to the early days of our nation. In the Privy Council case of *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49 which was applied by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v TCY Jaya Sdn Bhd (formerly known as Sykt Tan Chang Yong Holding Sdn Bhd)* [2024] 2 MLJ 362 Viscount Radcliffe held that:

> Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel.

[144] *Kok Hoong* is especially relevant to the present appeal which deals, not with the conduct of parties, but rather the statutory validity of ADW2 (also see: *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 (RBOA (1), pp 795–800).

[145] Accordingly, there can be no application of the doctrine of estoppel here in order to defeat the plaintiff's claim for a declaration that ADW2 is void pursuant to s 26 of the Contracts Act 1950. The void ADW2 cannot be legitimised due to the conduct of parties and/or by the doctrine of estoppel. It is automatically void due to a lack of consideration.

[146] The inapplicability of the doctrine of estoppel in the present appeal is further fortified by the defendant's failure to adduce any evidence to show that they had relied in any form or manner on the final payment made by the plaintiff, after the commencement of these proceedings. The defendant had not established a case of estoppel, namely, that the defendant had altered his position or acted in such a manner in reliance on the representation that it

would be inequitable or unconscionable in all the circumstances of the case for the plaintiff to go back on its promise/representation.

[147] The defendant submitted that the Court of Appeal erred in failing to acknowledge the binding nature of the variation under ADW2, especially considering that both parties had acted upon ADW2. This submission has no merits as there was no evidence adduced to show that the defendant had acted upon ADW2. Actually, there was nothing for them to act upon, in ADW2. The one and only reason for ADW2 to be executed was to increase the interest chargeable under ADW1, resulting in the plaintiff having to fork out an additional payment of RM49.367m to the defendant in July 2011. Essentially, there was nothing for the defendant to act upon under the same.

[148] What the defendant did was no more than to carry out the works under ADW1 and NADW which it was contractually obligated to carry out and remunerated for. The defendant has failed to show how they had altered their contractually bound position and/or conduct due to ADW2.

[149] Similarly, the plaintiff had never acted on ADW2 prior to the commencement of the action herein, as the payment to be made under ADW2 was only made in July 2011, approximately two years after the action had commenced in the High Court.

[150] On the assertion that when the plaintiff made the payment RM49.367m under ADW2, that amounts to a conduct on the part of the plaintiff which amounts to a waiver of the plaintiff's rights under s 26 of the Contracts Act 1950, we agree with the submissions of the plaintiff that the final payment that was made by the plaintiff to VVB, on 1 August 2011, cannot amount to a waiver of the plaintiff's right due to the following reasons:

(a) the plaintiff had already filed the originating summons herein for a declaration that ADW2 was void for want of consideration, more than two years before the payment by the plaintiff was made to VVB. By then, the defendant was already aware that the plaintiff was actively pursuing to challenge the validity of ADW2 when it made the said payment to the defendant;

(b) the only reason the plaintiff made payment to VVB was due to the letter of demand dated 27 June 2011 issued by the defendant to the plaintiff. The plaintiff made the said payment, upon receipt of the demand. Despite the commencement of these proceedings, the plaintiff was concerned that it would be penalised heavily with an additional 3% interest rate if the payment was not made and in the event the originating summons were subsequently dismissed. Being a prudent statutory body

and in the exercise of caution, the plaintiff had made payment of the same first, with a reservation of rights;

(c) the imposition of this penalty was admitted by Stephen Abok, witness for the defendant; and

(d) in fact, the contemporaneous board meeting minutes on 26 July 2011 clearly indicated that the plaintiff's payment was to be made on a without prejudice basis. The payment was only made after the said plaintiff's Board of Directors meeting.

The above had been expressly pleaded by the plaintiff at para 6 of its reply to defence dated 9 November 2012.

[151] Therefore, the aforesaid payment cannot amount to a waiver of the plaintiff's rights given that it had already commenced it's claim in the courts. The defendant was put on notice as to the plaintiff's challenge on the validity of ADW2 at the time in which the payment was made.

[152] In light of the above, it is clear that the plaintiff is not estopped from proceeding with its claim herein to have ADW2 declared void pursuant to s 26 of the CA.

[153] We answered question 4 in the negative.

CONCLUSION

[154] Our answers to the questions framed are as follows:

(a) question 1: we decline to answer question 1;

(b) question 2: we decline to answer question 2;

(c) question 3: we answered in the negative; and

(d) question 4: we answered in the negative.

[155] Given the aforesaid, we do not find any error on the part of the Court of Appeal in arriving at its decision. We, therefore, dismissed the appeal and affirmed the decision of the Court of Appeal with costs of RM100,000 to the respondent subject to allocatur.

Appeal dismissed; decision of Court of Appeal affirmed with costs of RM100,000 to respondent (plaintiff) subject to allocatur.

Reported by Dzulqarnain Ab Fatar